



July 11, 2003

Ms. Christine Godfrey  
Chief, Regulatory Division  
New England District, Corps of Engineers  
Department of the Army  
696 Virginia Road  
Concord, Massachusetts 01742-2751

Re: Islander East Pipeline Project, Application No. 200103091

Dear Ms. Godfrey:

Islander East Pipeline Company, LLC ("Islander East") appreciates your willingness to meet with us and with representatives of the Federal Energy Regulatory Commission ("FERC") and the White House Task Force on Energy Project Streamlining ("Task Force") on Thursday, July 3, 2003. This letter follows up on our discussions during that meeting with respect to the definition of "purpose" which should form the basis for the Corps of Engineers' ("COE's") review of the proposed Islander East project (the "Project").

As you are aware, the FERC authorized the construction of the Project by orders dated September 19, 2002 and January 17, 2003.<sup>1</sup> The FERC agreed with Islander East that the purpose and need of the Islander East Project is to provide needed gas supplies via a second crossing of Long Island Sound in order to promote competition and enhance security and reliability:

The proposed Islander East project will provide Long Island with another source of supply, allowing this market to enjoy the benefits of pipeline-to-pipeline competition for the first time. More importantly, . . . the proposed Islander East project will provide much needed security and reliability by providing a second facility to access supply in the event something happens to either [the Iroquois or Islander East] facilities.<sup>2</sup>

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<sup>1</sup> *Islander East Pipeline Company, LLC*, 100 FERC ¶61,276 (Sept. 19, 2002), *aff'd*, 102 FERC ¶61,054 (Jan. 17, 2003).

<sup>2</sup> 102 FERC at para. 5. As the FERC noted, the configuration of this project has been dictated by the market being served. *See id.* at para 61.

Islander East understands that the COE, for purposes of evaluating the Islander East Project and alternatives to it, needs to identify the Project's "basic" or "overall" purpose. Islander East respectfully submits that in so doing the COE should take into consideration the quoted definition of the Project's purpose and need, which Islander East has repeatedly identified as the Project purpose in its various submissions to the COE,<sup>3</sup> for the following reasons.

First, COE recognition of this definition of the Project's purpose and need would be consistent with Executive Orders issued by President Bush in May 2001 and May 2003, which direct executive agencies to "take appropriate actions, to the extent consistent with applicable law, to expedite" projects which increase the transmission of energy, and particularly those that "will strengthen pipeline safety".<sup>4</sup>

Second, COE acknowledgement of the definition accepted by FERC would also be consistent with the InterAgency Agreement<sup>5</sup> which reinforces FERC's traditional role as the lead agency in evaluating interstate natural gas infrastructure projects such as Islander East and encourages "coordination of the processes through which [the agencies'] environmental . . . review responsibilities under [NEPA] and other related statutes are met" in connection with such projects. Among other things, the Agreement specifically contemplates that the signatory agencies will proceed cooperatively in the development of alternative routes and actions.<sup>6</sup>

Third, COE consideration of the FERC-accepted purpose and need of the Project would recognize the comprehensive regulatory and environmental review of the Project undertaken by FERC and would therefore be supported by the COE regulations

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<sup>3</sup> See Letter from Islander East to Ms. Cori M. Rose dated July 1, 2002 (the benefits of a new, separate transmission line across Long Island Sound "were a driving force behind the proposal to build and operate the Islander East Pipeline and thus are a stated objective of Island[er] East that cannot be matched by the Iroquois ELI Project, which relies on Iroquois's single line delivery system"); Letter from Islander East to Ms. Cori Rose dated October 11, 2002 ("the ELI System Alternative is clearly not available, it is not practicable, nor is it capable of adequately fulfilling an elemental purpose of the Islander East Project; it cannot provide the operational and security of supply benefits of a separate natural gas pipeline crossing").

<sup>4</sup> Executive Order 13212 of May 18, 2001, § 1, 66 Fed. Reg. 28357 (2001); Executive Order 13302 of May 15, 2003, § 1, 66 Fed. Reg. 27429 (2003).

<sup>5</sup> Interagency Agreement on Early Coordination of Required Environmental and Historic Preservation Reviews Conducted In Conjunction with the Issuance of Authorizations to Construct and Operate Interstate Natural Gas Pipelines Certificated by the Federal Energy Regulatory Commission (May 2002).

<sup>6</sup> See *id.* at 4-6.

which discourage duplicative environmental reviews.<sup>7</sup> Islander East also believes that COE cooperation with FERC on this matter is supported by the Task Force.

Fourth, COE adoption of the FERC and applicant-defined Project purpose of providing a second, independent pipeline crossing is consistent with, if not required by, COE regulations and applicable caselaw, as discussed below.

Islander East submits that the Project, as approved and routed by FERC, satisfies the COE's "LEDPA," or least environmentally damaging practicable alternative, test. This is because all of the alternatives which have been identified to date either (i) involve greater environmental impacts than the proposed Project or (ii) cannot meet the Project purpose of increasing the reliability of natural gas delivery service by installing a separate natural gas pipeline across Long Island Sound. The FERC conclusively found that all alternatives, with the possible exception of those based on the existing Iroquois facilities (including the so-called ELI Project), were environmentally inferior to the Project. With respect to the Iroquois-based alternatives, the FERC determined specifically that the Project "will provide much-needed competition and reliability that the ELI System Alternative and Iroquois' ELI Project cannot;"<sup>8</sup> that the Iroquois-based alternatives do "not meet the pipeline goals of providing flexibility and reliability;"<sup>9</sup> and that "an alternative similar to the ELI System Alternative that would use the existing Iroquois' facility cannot accomplish[] the policy goals satisfied by a second pipeline similar to the proposed Islander East Project."<sup>10</sup>

This analysis is consistent with the COE's regulations, which define "practicable" to mean "available and capable of being done after taking into consideration cost, existing technology, and logistics, *in light of overall project purposes*."<sup>11</sup> Islander East respectfully submits that, if the COE takes into account FERC's determination that there are no environmentally preferable alternatives which can meet the Islander East Project purpose of enhancing supply availability, reliability and competition, it will also conclude that there are no "practicable" environmentally superior alternatives to the Project, and that therefore the Project, as routed by FERC, is the least environmentally damaging *practicable* alternative, and should be promptly permitted.<sup>12</sup>

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<sup>7</sup> 33 C.F.R. §320.1(a)(3) (COE policy is to "avoid unnecessary regulatory controls . . . over activities . . . which are adequately regulated by another agency").

<sup>8</sup> 102 FERC ¶61,054 at para. 55.

<sup>9</sup> *Id.* at para. 60.

<sup>10</sup> *Id.* at para. 102.

<sup>11</sup> 40 C.F.R. §230.10(a)(3) (emphasis added).

<sup>12</sup> Islander East takes this opportunity to note that it disagrees with the COE's conclusion that the Project is not a water-dependent activity, because so long as it is recognized that a purpose of the Project is to transport natural gas via a second pipeline to Long Island, it is clear that a Long Island Sound crossing is required. However,

This analysis is also consistent with, if not compelled, by applicable caselaw. In *Stewart v. Potts*,<sup>13</sup> the court reviewed the COE's evaluation of a proposal to construct an in-city municipal golf course. Holding that the COE had properly refused to consider alternatives outside the city limits, the court explained that the COE regulations "were adopted with the idea that it is 'implicit that, to be practicable, an alternative must be capable of achieving the best purpose of the proposed activity.'"<sup>14</sup> The court stated that, so long as the applicant's purpose is "legitimate," "it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."<sup>15</sup> The court went on to explain that "not only is it permissible for the Corps to consider the applicant's purpose in considering practicable alternatives, the Corps has an affirmative duty to accord weight to the objectives of the applicant."<sup>16</sup>

A case even more similar to the Islander East situation is that of *Water Works & Sewer Board v. Dep't of the Army*,<sup>17</sup> in which the City of Birmingham had applied for a COE permit to construct a water intake structure. The COE had declined to consider an alternative which would have required the City to continue to purchase water from a local water company on the basis that the overall project purpose was to provide an "independent" water supply system and an "independent" supply source. The court affirmed that COE's finding that the water purchase option "does not meet the overall project purpose and is therefore not considered to be practicable."<sup>18</sup> It is equally clear here that because alternatives based on the Iroquois system do not meet the project purpose of providing an independent system and supply source, they do not meet the purpose of the Islander East Project and are therefore not practicable.

Similarly, in *Sylvester v. U.S. Army Corps of Engineers*,<sup>19</sup> the court upheld the COE's determination that a project purpose of building a golf course as part of a resort foreclosed the consideration of off-site golf course locations. The COE decision had been challenged on the grounds that acceptance of the applicant's purpose impermissibly skewed the COE's alternatives analysis. The court explained that, while an applicant cannot define a purpose which automatically excludes the existence of any

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Islander East does not believe it is necessary to resolve this disagreement in order to reach the conclusion that the Project meets the I.EDPA test.

<sup>13</sup> 996 F. Supp. 668 (S.D. Tex. 1998).

<sup>14</sup> *Id.* at 675 (quoting *Louisiana Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 675-76.

<sup>17</sup> 983 F. Supp. 1052 (N.D. Ala. 1997), *aff'd without opinion*, 162 F.3d 98 (11th Cir. 1998), *cert. denied*, 528 U.S. 951 (1999).

<sup>18</sup> *Id.* at 1077.

<sup>19</sup> 882 F.2d 407 (9th Cir. 1989).

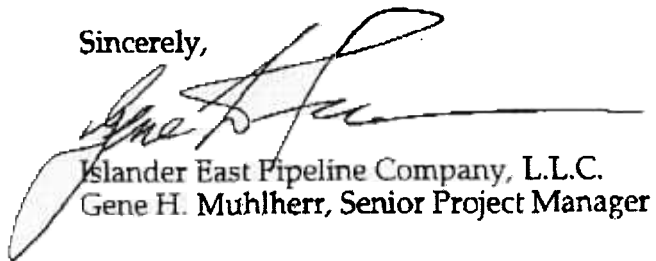
other alternatives, the COE was entitled to recognize the applicant's genuine and legitimate objectives, and therefore had acted appropriately.<sup>20</sup> Here, Islander East's genuine and legitimate purpose of providing a second Long Island Sound crossing does *not* eliminate all other alternatives from consideration. To the contrary, it diminishes the value of only those alternatives that involve expansion of an existing Sound crossing. Although Islander East submits that the other, non-Iroquois based alternatives are all environmentally inferior to the Project (and FERC so found), acknowledgment of the purpose of a separate pipeline does not foreclose the evaluation of those alternatives.

On the other hand, for the COE to reject the purpose of the Project as defined by Islander East and confirmed by FERC in favor of an alternative based on existing systems would truly be bizarre, since it is clear that such a project would fail to "accomplish the policy goals" identified by FERC, and therefore would likely not be certificated by that agency. It is hard to think of a result which would be more at odds with our Nation's current energy policy, the stated goals of interagency coordination and expedition, and the critical need to enhance natural gas pipeline infrastructure in the Northeast United States.

For all of these reasons and for those additional reasons set forth in our letter to you of June 24, 2003, we urge the COE to take into consideration in its definition of the Project's "purpose" the applicant and FERC-defined purpose to deliver natural gas to Long Island via a separate, second pipeline.

We look forward to our continuing discussions with you.

Sincerely,



Islander East Pipeline Company, L.L.C.  
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<sup>20</sup> *Id.* at 409-10.

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